IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 877 OF 1999.

1. Rajan Baburao Patil,
2. Dattatray Mahadeo Salunkhe. .... Appellants.

Versus.

1. Smt.Nagarbai Sadhyu Pawar.
2. (deleted).
3. Maruti Sadhu Pawar.
4. Babyu Sadhu Pawar.
5. Barku Sadhu Pawar.
6. The New India Assurance Co.Ltd. .... Respondents.

Shri G.S.Godbole for the Appellants.

Shri M.B.Kotak for the Respondents Nos.1, 3 to 5.

Shri S.R.Singh for the Respondent No.6.

CORAM : ABHAY S. OKA, J.

DATED : 7th June, 2006.

ORAL JUDGMENT.

1. I have heard Shri Godbole appearing for the Appellants, Shri Kotak appearing for Respondents Nos.1, and 3 to 5 and Shri S.R.Singh for Respondent No.6.

2. The Appellants who are the original Opponents Nos.1 and 2 in a Claim Petition filed under section 166 of the Motor Vehicles Act, 1988 have taken exception to the Judgment and Award dated 18th December 1997 passed

by the learned Member of the Motor Accident Claims Tribunal, Solapur. The Respondents Nos.1 to 5 were the original Claimants before the Tribunal. The name of Respondent No.2 was deleted during the pendency of the claim petition and hence the name of Respondent No.2 has been subsequently deleted from the cause title of the Appeal. According to the case of the Respondents Nos.1 and 3 to 5 (hereinafter referred to as "the Claimants"), on 26th May 1993 the deceased Sadhu was walking along a public road near Jagdamba Spinning Mill. At that time a Swaraj Mazda vehicle owned by the Appellant No.1 and allegedly driven by Appellant No.2 came in excessive speed and dashed the deceased from his back side. The deceased expired on the spot. The Claimants are the legal representatives and dependants of the deceased. According to the Claimants, the accident occurred due to the negligence on the part of the Appellant No.2.

3. The Appellant No.2 filed written statement contending that one Kundlik Jalindar Thite was employed as a driver of the said Swaraj Mazda vehicle and the Appellant No.2 was the cleaner though he was holding a valid driving licence. He contended that he was falsely charge sheeted and was subsequently acquitted. Respondent No.6 herein which is the insurance company

with which the said vehicle was insured, filed a written statement contending that the driver was not having necessary licence to drive the vehicle concerned.

4. The learned Member of the Tribunal held that the accident occurred due to the gross negligent driving of the Swaraj Mazda vehicle which resulted in the demise of the deceased. The learned Member recorded a finding that the vehicle was a goods transport vehicle and at the relevant time was having a goods carriage permit. The learned Member found that at the relevant time there were 12 milk cans in the vehicle out of which seven were filled with milk. The learned Member found that on the relevant date the Appellant No.2 was possessing a licence which entitled him to drive a non-transport light motor vehicle. The learned Member found that an endorsement was made on the licence of the Appellant No.2 that from 1st July 1995 he was permitted to drive a transport vehicle. The learned Member of the Tribunal held that though Respondent No.6-Insurance Company has not led any evidence, the breach of the terms and conditions of the policy of insurance was established and the Respondent No.6 was not liable to honour the award which may be passed against Appellant No.1 who is the insured.

4. Shri Godbole, learned Counsel appearing for the Appellant submitted that the entire burden of establishing that the Appellant No.1 had committed breach of the terms and conditions of the Policy was on the Respondent No.6 and that the said Respondent has not discharged the burden. He submitted that the Appellant No.2 stepped into the witness box and stated that he was not driving the vehicle at the relevant time and he was a cleaner of the vehicle though he was possessing a valid driving licence. He submitted that Appellant No.2 in his evidence named the driver who was driving the vehicle at the relevant time and no finding is recorded that the said driver was not in possession of a valid driving licence. He submitted that the Tribunal has not considered the issue whether the Appellant No.2 was really driving the vehicle at the relevant time. He submitted that the evidence on record proves that there was no negligence on the part of the Appellant No.1 which resulted in breach of the terms and conditions of policy. He submitted that the vehicle cannot be called as a goods transport vehicle. He invited my attention to the decision of the Apex Court reported in 2004 ACJ (Vol.I) page 1 (National Insurance Co.ltd. v/s. Swaran Singh and others). He submitted that the compensation

awarded was excessive.

5. Shri Kotak, learned Advocate appearing for the Claimants submitted that the Award passed by the Tribunal is reasonable and no interference was necessary. He submitted that the Appellants and Respondent No.6-Insurance Company are liable to pay the compensation. Shri Singh appearing for Respondent No.6-Insuracne Company submitted that there was a clear breach of the terms and conditions of the policy on the part of Appellant No.1. He invited my attention to the evidence on record. Without prejudice to the rights and contentions of the Respondent No.6 he submitted that if this Court comes to the conclusion that the Respondent no.6 is liable to pay the awarded compensation in view of the existence of insurance policy, a permission be granted to the Respondent No.6 to recover the amount of compensation from the Appellant No.1. He invited my attention to a decision of the Apex Court in Civil Appeal No.1731 of 2006 in the case of National Insurance Co. Ltd. v/s. Kusum Rai and others.

6. I have carefully considered the submissions made by the learned Counsel appearing for the parties. The principles laid down by the Apex court in the case of

National Insurance Co.Ltd. V/s. Swaran Singh and others, have been summarised in paragraph 102 of the said decision. Clauses (iii) and (iv) of paragraph 102 read thus:

> "(iii) The breach of policy conditions, e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. **Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not**

disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish'breach' on the part of the owner of the vehicle, the burden of proof wherefor would be on them."

The entire evidence will have to be appreciated in the light of the law laid down by the Apex Court in the aforesaid decision.

7. As stated earlier, a written statement at Exh.51 was filed by the Appellant No.2 stating therein that one Kundalik Jalinder Thite was driving the tempo at the relevant time and the Appellant No.2 was employed as a cleaner of the tempo at the relevant time. It is stated that though the Appellant No.2 was prosecuted, he has been acquitted. The Appellant No.2 stepped into the witness box. In the examination-in-chief he has stated that in May 1993 he was serving with the Appellant No.1

as a cleaner. He has stated that he was having a valid licence to drive a light motor vehicle. He categorically stated that at the time of accident one Kundalik Jalinder was employed by the Appellant No.1 as the driver of the vehicle. He stated that the accident was not contributed by Shri Thite. In the cross-examination he denied the suggestion that he was falsely stating that the said Kundalik Thite was driving the vehicle. It is pertinent to note that except Appellant No.2 no other witness has been examined by both the sides who can be said to be an eye witness to the accident. There is no independent evidence led to show that the Appellant No.2 was driving the vehicle at the relevant time. The learned Judge has rejected the contention of the Appellant No.2 only on the ground that the Appellant No.2 was charge sheeted.

8. The Apex Court in the case of Swaran Singh (supra) has held that with a view to avoid liability, the insurance company must not only establish the invalidity of the licence but must also prove the breach on the part of the insured and the burden of proving the breach will be on the insurance company. It is also held that mere absence, fake or invalid driving licence or disqualification of the driver for driving at the

relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. The Apex Court held that to avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver. In the present case it was necessary for the Respondent No.6 to prove that the Appellant No.1 has committed the breach. For establishing this breach it was necessary for Respondent No.6 to lead evidence firstly to prove that the Appellant No.2 was driving the Tempo and not the said Kundalik Thite. The Respondent no.6 could not have discharged its burden without proving that it was the Appellant No.2 who was driving the Tempo at the relevant time. The Appellant No.2 filed written statement contending that it was Kundalik who was driving the vehicle and he examined himself on oath to substantiate the contention. As against this there is no evidence to show that the Appellant No.2 was driving the vehicle.

9. Even assuming that the Respondent No.6 has established that the Appellant No.2 was driving the vehicle at the relevant time, the question is whether

the Appellant No.1 is guilty of negligence and has failed to exercise reasonable care in the matter of fulfilling the conditions of policy. It must be noted here that in the first sentence of examination-in-chief of Appellant No.2, he has stated that in May 1993 he was serving with the Appellant No.1 as a cleaner. He has further stated that at the time of accident the said Kundalik Thite was the employee of Appellant No.1 to drive the said Tempo. In the cross-examination of the Appellant No.2, no suggestion has been given to the effect that the Appellant No.1 had not employed Kundalik Thite as driver to drive the Tempo at the relevant time. The only suggestion given in the cross-examination is that Thite was not driving the vehicle at the relevant time. Negligence on the part of Appellant No.1 could have been established by proving that it was the Appellant No.1 who permitted Appellant No.2 to drive the Tempo at the relevant time. There is nothing on record to show that the Appellant No.2 was driving the vehicle at the relevant time on the instructions of Appellant No.1 or that the Appellant No.1 allowed the Appellant No.2 to drive the vehicle with the knowledge that he does not possess a valid driving licence. Thus it must be concluded that the Respondent No.6 has failed to discharge its burden of establishing that the Appellant

No.1 was negligent and failed to exercise reasonable care in the matter of fulfilling the conditions of the policy regarding use of the vehicle by a licenced driver. Therefore, applying the law laid down by the Apex Court in the case of National Insurance Co.Ltd. v/s. Swaran Singh (supra), it is obvious that the Respondent No.6 insurance company has failed to discharge the burden of proving breach of terms and conditions of the insurance policy on the part of Appellant No.1. Thus the learned Judge has committed a serious error by holding that there was breach of terms and conditions of policy of insurance. In fact the learned Member of the Tribunal has not at all considered the matter in the context of burden of proof for establishing the breach. Therefore, to that extent the impugned Award will have to be modified.

10. So far as the quantum is concerned only a sum of Rs.60,000/- is awarded to Claimants Nos.1 and 2 with interest at the rate of 12% per annum from the date of the filing of claim petition. The Respondent No.1 who is the widow of the deceased was examined. According to her the age of the deceased was 60 at the time of the accident and he was earning about Rs.30/- to Rs.40/- per day by doing labour work. The learned Member of the

Tribunal has relied upon the structured formula incorporated in the Second Schedule to the said Act of 1988. The learned Member awarded only a sum of Rs.50,000/- towards compensation and Rs.5,000/- on account of loss of consortium and Rs.5000/- on account of loss of estate totalling to Rs.60,000/-. The compensation awarded cannot be said to be excessive in a case of fatal accident. Hence there is no merit in the said submission of the learned Advocate appearing for the Appellants.

10. Hence the following order:

i) The Appeal is partly allowed.

ii) That part of the impugned Judgment and Award by which the original Opponent No.3 -New India Assurance Company Ltd. was exonerated by the Tribunal is quashed and set aside. The Award is modified to the extent that the original Opponent Nos.1 to 3 shall be jointly and severally liable to pay the compensation awarded by the Tribunal.

iii) Rest of the Award is maintained.

vi) No order as to costs.

Judge.